SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-796

AMAREX, INC.,
Petitioner,

v.

THE FEDERAL ENERGY REGULATORY COMMISSION AND THE ARKANSAS LOUISIANA GAS COMPANY,
Respondents.

BRIEF OF RESPONDENT ARKANSAS LOUISIANA GAS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent Arkansas Louisiana Gas Company ("Arkla") respectfully requests that the petition for writ of certiorari sought by Amarex, Inc. ("Petitioner" or "Amarex") be denied.

I.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit in *Amarex, Inc.* v. *Federal Energy Regulatory Commission* of which review is sought

by Petitioner is reported at 603 F.2d 127. A copy of the Opinion is appended to Amarex's petition as Petitioner's Appendix A (Pet. App. A).[1]

II.

QUESTIONS PRESENTED

1. Whether the court below correctly affirmed the decision of Respondent Federal Energy Regulatory Commission ("the Commission" or "F.E.R.C.") finding certain natural gas reserves to be dedicated to the interstate market pursuant to Section 7(c) of the Natural Gas Act ("the Act") and, therefore, subject to the provisions of Section 7(b) of the Act which prohibits abandonment without prior Commission approval.

2. Whether the opinion of the court below is consistent with this Court's decisions in *California* v. *Southland Royalty Co.,* 436 U.S. 519 (1978), and *United Gas Pipe Line Co.* v. *McCombs,* 99 S.Ct. 2461 (1979).

III.

STATUTES INVOLVED

The statutes involved in this case are Sections 7(b) and 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(b) and (c), which provide in pertinent part:

> Abandonment of facilities or services; approval of Commission; certificate of convenience and necessity.

[1] Reference to Petitioner's appendices are as follows "(Pet. App. ——)". Reference to Respondent Arkla's appendices will be of the form "(Resp. App. ——)".

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission . . . and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.
>
> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . .

IV.

STATEMENT OF THE CASE

A. Nature Of The Case

This case involves the question whether the Commission properly required an independent producer to sell natural gas in interstate commerce under Sections 7(b) and (c) of the Natural Gas Act consistent with this Court's decisions in *California* v. *Southland Royalty Co.,* 436 U.S. 519 (1978), and *United Gas Pipe Line Co.* v. *McCombs,* 99 S.Ct. 2461 (1979). The court below found that the Commission's orders were consistent with the principles of *Southland* and *McCombs* and should therefore be affirmed. The court below held that the initiation of interstate service pur-

suant to a certificate of public convenience and necessity dedicated "all fields" subject to that certificate and that the dedication of gas was not extinguished by the expiration of the producer's lease. The independent producer in this case has always possessed the legal right to sell the gas that it dedicated since the lease which "expired" was renewed or actually extended (Pet. App. A-9).[2]

B. Facts

In January, 1970 Amarex acquired by assignment from Sinclair Oil & Gas Company a lessee interest in a May 4, 1967 oil and gas lease (the "1967 lease") covering the Southeast Quarter of Section 22, Township 10 North, Range 26 West, Beckham County, Oklahoma ("Southeast Quarter"). On June 6, 1970, Amarex and Arkla executed a Gas Purchase Contract, by which Amarex agreed to sell and deliver, and Arkla to purchase and receive, production from "certain natural gas properties located in the Anadarko Area, Oklahoma," for a period of 20 years following the effective date of the contract and from year to year thereafter.

Specifically, the contract provided:

> Section 2. COMMITMENT
>
> (A) Subject to the further provisions hereof, [Amarex] hereby agrees to sell and deliver to [Arkla], and [Arkla] agrees to purchase and receive from [Amarex], the natural gas production attributable to [Amarex's] interest in all Contract Wells, and to that end [Amarex] hereby subjects and commits hereto the Contract Leases.

[2] *Summers, Oil and Gas*, Section 302 (1959).

"Contract Wells" and "Contract Leases" are defined as follows:

> (F) "Contract Leases" refers to the oil and gas leases and other mineral interests described in the schedule attached hereto and made part hereof as Exhibit A.
>
> (G) "Contract Wells" refers to all wells now or hereafter completed as commercially productive of natural gas on lands covered by the Contract Leases or on a production unit which includes any part of said lands.

The contract further provided:

> This contract shall be subject to all relevant present and future local, state and federal laws, and all rules, regulations, and orders of any regulatory authority having jurisdiction.

One of the "Contract Leases" described in Exhibit A to the contract was the 1967 lease covering the Southeast Quarter.

In November, 1970 Amarex filed with the Commission an application for a small producer certificate of public convenience and necessity. By virtue of the Commission's Order No. 428,[3] Amarex was on August 12, 1971, granted a blanket certificate in Docket No. CS71-92 covering all of Amarex's sales and service in interstate commerce nationwide including that contemplated by the 1970 Amarex-Arkla contract. The order granting the certificate provided, among other things (Pet. App. A-3):

> The grant of the certificates aforesaid for service to the particular customers involved shall not im-

[3] *Exemption of Small Producers from Regulation*, Docket No. R-393, 45 F.P.C. 454 (1971), *rev'd in part, F.P.C.* v. *Texaco, Inc.*, 417 U.S. 380 (1974).

> ply approval of all of the terms of the contracts, particularly as to the cessation of service upon the termination of said contracts as provided by Section 7(b) of the Natural Gas Act.

Amarex's service under the gas purchase contract and the certificate of public convenience and necessity commenced with initial deliveries to Arkla in November, 1971, of gas from acreage other than the Southeast Quarter.

The 1967 lease expired in September, 1972, no oil or gas having been produced from the Southeast Quarter so as to extend the leasehold. Five months earlier, however, the lessors executed a new lease with Amarex (the "1972 lease") covering the Southeast Quarter, for a period beginning on the expiration date of the 1967 lease for a primary term of five years. Prior to executing the 1972 lease, Amarex requested and received a title opinion, which read in relevant part (Pet. App. A-4):

> By instrument dated June 6, 1970, Amarex, Inc. and Arkansas Louisiana Gas Company entered into a gas purchase contract covering the lease under consideration. The terms and conditions of the contract are not set forth in the instrument of record, but you are advised that any gas produced from the premises is subject to said contract.

The Southeast Quarter was, with the three other quarters of Section 22, declared a drilling and spacing unit by the Oklahoma State Corporation Commission. In August, 1975, a commercially productive gas well was completed in the unit which included the Southeast Quarter.

C. Proceedings Before The Commission

The agency proceeding was instituted by the complaint which Arkla filed on December 22, 1975 asking the Commission to direct Amarex to deliver to Arkla natural gas attributable to Amarex's interest in the Southeast Quarter. Amarex, in turn, filed with the Commission a petition for a declaratory order seeking a determination that Arkla was not entitled to the gas attributable to Amarex's leasehold.

The Commission found that no significant questions of fact were presented by the complaint and petition and directed the parties to file briefs addressing the legal issues involved in the controversy. Because Arkla's complaint and Amarex's petition for a declaratory order concerned the same controversy, the Commission also granted a motion by Amarex to consolidate the two dockets.

Following the filing of initial and reply briefs, the Commission in Opinion No. 798 (Pet. App. C) found that the public service obligation imposed by Amarex's small producer certificate of public convenience and necessity, and the terms of the gas purchase contract between Amarex and Arkla, applied to the natural gas production from dedicated reserves in the Southeast Quarter. Consequently, the Commission directed Amarex to deliver any gas produced from or attributable to Amarex's interest in the Southeast Quarter to Arkla for interstate transportation and sale.

The Commission denied Amarex's application for rehearing in Opinion No. 798-A (Pet. App. B).

D. Proceedings In The Court Below

Amarex petitioned the United States Court of Appeals for the Tenth Circuit for judicial review of the Commission's opinions pursuant to section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). On July 17, 1979, the Court of Appeals entered an opinion and judgment affirming the Commission's orders. The Court of Appeals denied rehearing on August 27, 1979.

V.

REASONS FOR DENYING THE PETITION

The decision of the court below correctly applied the decisions of this Court in *Southland* and *McCombs*. There is no basis for further review in this Court.

A. The Opinion Of The Court Below Is Consistent With *Southland*

In *Southland*, this Court held that a producer's service obligation pursuant to a certificate of public convenience and necessity is not limited by the term of the producer's lease and that the dedication of gas is not extinguished by the expiration of the lease. *Southland*, 436 U.S. at 525; 530-31.

The facts in *Southland* were that the lessee-producer sold gas production in interstate commerce under a fixed-term fifty-year lease. When the lease expired, the landowners attempted to sell the gas in intrastate commerce. The Supreme Court held that the issuance of an unlimited certificate of public convenience and necessity created an obligation to continue to serve the interstate market which extended in duration beyond the expired term of the lease. The Court also held that the expiration of the lease did not affect the

duration of the certificate obligation which attached to the gas (not the lease) so as to bind all parties having dominion over the sale of the gas, even the producer's lessor-landowners. Id., at 527. The certificate at issue in *Southland* was found to be of the same type as that involved in *Sun Oil Co.* v. *F.P.C.*, 364 U.S. 170, 175 (1960), where it was determined that a certificate which had no stated term of years was a certificate of "unlimited duration" and as such was not limited by the term specified by private contract or lease. *Southland*, 436 U.S. at 521-522. Citing *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960), this Court concluded, *Southland*, 436 U.S. at 525:

> once gas begins to flow in interstate commerce from a field subject to a certificate of unlimited duration, that flow could not be terminated unless the Commission authorized an abandonment of service. The initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate. The expiration of a lease on the field of gas does not affect the obligation to continue the flow of gas, a service obligation imposed by the Act.

As was the situation in *Southland*, Amarex was issued and accepted a certificate of unlimited duration (Pet. App. A-3, C-14). The certificate contains no stated term of years.[4] Indeed, the certificate in this case

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[4] Of particular relevance to this point is the Supreme Court's decision in *Sun Oil*, supra, which was cited in *Southland*. In *Sun Oil*, an independent producer applied for a certificate authorizing the sale of gas in the circumstances consisting simply of a reference to the producer's gas purchase contract with the interstate pipeline company. The contract provided for a term of ten years. The Commission issued a certificate making no reference to any limitation of time. After expiration of the term of the original contract, the producer filed an application for a new certificate covering a new contract, and the Commission rejected

is not ambiguous. The certificate issued to Amarex clearly rejected the notion that there could be a contractual (or lease) limitation upon the duration of Amarex's service obligation. Supra, pp. 5-6.

Since the certificate issued to Amarex in the instant case was of unlimited duration, it follows that once Amarex commenced the delivery of gas pursuant to the certificate, the expiration of the primary term of its original lease did not affect its service obligation under the certificate. The certificate of unlimited duration carried with it the obligation to continue to sell and to deliver gas in interstate commerce without any limitation relating to the lease. The expiration of the lease did not affect the service obligation imposed by the Act.

There is, of course, no question here about subjecting another party to the certificate obligation; there is no issue as to who is obligated to provide the service pursuant to the certificate. Amarex undertook that obligation itself under the certificate it obtained from the Commission. Moreover, Amarex has always had "dominion and power over the sale of the gas." Indeed, the record is clear that Amarex had the legal ability to bind itself to sell the gas in interstate commerce having possessed the same leasehold interest at all times throughout the period relevant to the controversy. Since the certificate obligation was found in *Southland* to attach to the gas so as to bind even reversionary landowners acquiring control over the sale of

the certificate application as "duplicative" of the producer's existing certificate. The Supreme Court affirmed the Commission and held that the original certificate was not limited to the life of the contract.

the gas, it is the case here, *a fortiori,* that Amarex bound itself under the certificate which it obtained from the Commission having itself always possessed that dominion and control.[5]

As the landowners in *Southland* argued that the gas underlying the acreage at issue was never dedicated to interstate service, it has been also urged here that the gas at issue could never have been dedicated since that gas was never delivered in interstate commerce (Pet. at 7). It is clear from the facts that no natural gas from the specific acreage at issue had been delivered by Amarex into Arkla's interstate pipeline system. However, *Southland* only requires that deliveries of natural gas be commenced in interstate commerce from any acreage covered by a certificate of unlimited duration. *Southland,* 435 U.S. at 525. When that event occurs, all gas reserves underlying the entire acreage covered by the certificate are dedicated to interstate commerce and no diversion of gas from interstate commerce can be accomplished unless and until such time as the Commission grants abandonment under Section 7(b) of the Act. The fact that no gas deliveries were made from the specific acreage at issue here is not determinative of whether the gas reserves underlying that acreage have been dedicated. The principle was stated in *Southland* as follows, 436 U.S. at 525 (emphasis added):

> The initiation of interstate service pursuant to the certificate dedicated *all fields* subject to that certicate. The expiration of a lease on the field of gas does not affect the obligation to continue the flow of gas, a service obligation imposed by the Act.

[5] Even under the traditional property law concepts, Amarex would be bound by its own certificate. See *Southland,* 543 F.2d 1134, 1138 (5th Cir. 1976).

Amarex next argues that the gas involved in this case is not covered by the contract. It argues that the contract in this case covers only specifically described leases and does not cover after-acquired leases (Pet., at 9). This argument runs counter to the determination in *Southland* that the subject of the dedication is the gas and not the lease, 436 U.S. at 527:

> Thus, by 'dedicating' gas to the interstate market, a producer does not effect a gift or even a sale of that gas, but only changes its regulatory status.

Amarex's argument also errs in its contention that the producer's service obligation is the same as the contract obligation (Pet. at 8). *Southland* and *Sunray,* supra, clearly negate this argument. The principle established in those cases is that the service obligation imposed by the Act exists separate and apart from the private sales contract or the lease.[6] *Southland,* 436 U.S. at 526:

> The obligation on the producer which survives after the contract term will not be one imposed by contract but by the Act. [*Sunray*] 364 U.S. at 155. The obligation to continue the service despite the provisions of the sales contract was held essential to effectuate the purposes of the Act; otherwise producers and pipelines would be free to make arrangements that would circumvent the rate-making and supply goals of the statute. Id., at 142-147.

[6] In the instant case, the contract is consistent with the service obligation imposed by the Act. The 1970 Amarex-Arkla contract committed gas to be produced from "Contract Wells" situated on particular acreage "covered by Contract Leases." Supra, p. 4, Contract, Sec. 4(A) and (F). This type of contract obligation runs with the land so that an after-acquired lease provision is unnecessary. See *Indian Territory Illum. Co.* v. *Bartlesville Zinc Co.*, 228 Fed. 273 (3rd Cir. 1923), cert. denied 263 U.S. 673 (1923). It should also be noted in response to Amarex's argument about after-acquired lease provisions (Pet. at 9) that the provisions in other cases referred to by Amarex are of the kind that reach out to include later-acquired leases covering adjoining acreage rather than leases covering the same acreage.

The cases which Amarex cites for the proposition that the dedication is determined by the terms of the gas purchase contract are inapposite to the duration of a producer's service obligation and of a dedication. These cases relate to the areal or volumetric scope of a producer's service obligation and not to the duration of that obligation. In *Gulf Oil Corp.* v. *F.P.C.,* 563 F.2d 588 (3rd Cir. 1977), cert. den. 434 U.S. 1062, reh. den. 435 U.S. 981, the issue was the quantity of gas which Gulf was obligated to deliver under a warranty contract underlying the certificate obligation. Likewise, the issue in *Vreeland* v. *F.P.C.,* 528 F.2d 1343 (5th Cir. 1976), involved a contract commitment clause that was limited to production from "specific reservoirs and depths." Those issues are not involved here. In the instant case, Amarex does not dispute that it dedicated the gas underlying the Southeast Quarter—what it questions is the duration of that dedication.[7] The duration of the dedication pursuant to an unlimited certificate is controlled by *Southland.*

[7] Since Amarex dedicated the gas on a voluntary basis in accepting the certificate (only the duration of which it challenges), there is no conflict with the *CATCO* case, *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378 (1959), as averred by Amarex (Pet. at 7-8). Because the gas underlying the Southeast Quarter was dedicated by Amarex (both under contract and certificate), the Commission has not forced a producer initially to dedicate gas to the interstate market.

B. The Opinion Of The Court Below Is Consistent With *McCombs*

The court below and the Commission held that the scope of Amarex's service obligation pursuant to its certificate includes current production from the Southeast Quarter. Both the Court of Appeals and the Commission determined that the commencement of service from any of the reserves underlying acreage subject to the certificate dedicated all of the reserves under the certificate.

McCombs supports this branch of the decision below. In *McCombs,* the question was whether a producer's certificate was limited to actual deliveries into interstate commerce. The producer group had argued that newly discovered reserves which were "separate and distinct" from previous production were outside the scope of the service obligation under the certificate. This Court stating that "[o]ur prior decisions compel rejection of this narrow statutory interpretation," held that the initiation of interstate service pursuant to the certificate dedicated "all fields" and "all reserves" subject to that certificate. *McCombs,* 99 S.Ct. at 2469-70.

The facts involved in the *McCombs* case were that there was a producer certificate containing neither a time limitation nor a depth limitation covering certain acreage.[8] Natural gas was produced from a portion of the acreage and delivered into interstate commerce. This production was from shallow reserves which eventually were depleted. Several years afterwards, the *McCombs* group acquired by partial assignment the deeper drilling rights. The *McCombs* group

[8] The certificate held by Amarex is of the same character, supra.

had not previously held any interest in the dedicated acreage. Drilling to the deeper horizons, the *McCombs* group discovered new gas reserves. The *McCombs* group argued, *inter alia,* that the new production was not dedicated because the reserves were "separate and distinct" from those reserves from which natural gas had previously been delivered into interstate commerce. In an unanimous opinion (8-0, Justice Stewart not participating) the Supreme Court held that the separate reserves which were never delivered into interstate commerce were dedicated under the Act by the commencement of deliveries from other portions of the dedicated acreage.

McCombs, then, confirms that part of the opinion below which finds that the producer's service obligation is not limited to actual deliveries into interstate commerce. In rejecting the actual deliveries construction of the Act, this Court also cited with approval the Commission's interpretation which was applied both in *McCombs* and in the instant case. Id., at 2469. Ratifying the Commission's decisions that have "reflected a similar understanding" of the Act, the Court said, 99 S.Ct. at 2469-70, n.4:

> For example, in *Cumberland Natural Gas Co.,* [34 F.P.C. 132 (1965)], where the producer had not yet obtained a certificate of convenience and necessity, the Commission held that "dedication of reserves for sale in interstate commerce occur[red] at least as soon as deliveries commenc[ed]" from any part of the 9,000 acre leasehold contractually committed to an interstate pipeline. Id., at 136. Accordingly, the agency required that all gas subsequently produced from the entire dedicated leasehold, even if discovered after the dedication, be sold in interstate commerce until the Commission approved an abandonment. *Id.,* at 136-137. See

also *Pioneer Gathering System, Inc.*, 23 F.P.C. 260, 263 (1960); *Murphy Oil Corp.* v. *F.E.R.C.*, 589 F.2d 944 (CA8 1978); *Mitchell Energy Corp.* v. *F.P.C.*, 533 F.2d 258 (CA5 1976).

These are the same cases on which the Commission relied in concluding in the instant case, as did the Supreme Court in *McCombs,* that a producer's certificate is not limited to actual deliveries.[9]

The *McCombs* decision is relevant and controls the instant case with regard to the decision below that the scope of Amarex's service obligation under the Act is not limited to actual deliveries of natural gas into interstate commerce. As the Supreme Court held in *McCombs,* the initiation of interstate service pursuant to the certificate dedicates "all fields" and "all reserves" subject to that certificate.

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[9] Amarex cites *Wessely Energy Corp.* v. *Arkansas Louisiana Gas Co.*, 593 F.2d 917 (10th Cir. 1979), as being in conflict with the opinion of the court below on this point. Pet., p. 11. There is no real conflict. First, it should be noted that *Wessely* was decided prior to *McCombs*. Second, the different result in *Wessely* (while not explained by the court) is in accordance with the dedication provisions of the Natural Gas Policy Act of 1978 ("NGPA"), Sections 2(18)(B)(iii) and 601(a)(1)(A). A copy of NGPA Sections 2(18) and 601(a)(1)(A) are attached to this brief as Respondent's Appendix A. The dedication found to exist in the instant case, unlike *Wessely,* is preserved under the NGPA. For this reason, the parties agreed at oral argument that the NGPA does not affect this case (Pet. App. A-9).

VI.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

NATURAL GAS POLICY ACT OF 1978,

15 U.S.C.A. §§ 3301, et seq.

Section 2(18), 15 U.S.C.A. § 3301(18):

Definitions

For purposes of this chapter—

(18) COMMITTED OR DEDICATED TO INTERSTATE COMMERCE.—

(A) GENERAL RULE.—The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) EXCLUSION.—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section

7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

Section 601(a)(1)(A), 15 U.S.C.A. § 3431(a)(1)(A):

Coordination with the Natural Gas Act

(a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT.—

(1) SALES.—

(A) NATURAL GAS NOT COMMITTED OR DEDICATED.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.